

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No.346 of 1984

**

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

1 to 5 : No

BAI KASHI D/O JAGA HARI

Versus

BRAHMAVATI WD/O KHUBCHAND DALICHAND

Appearance:

Shri C.G. Nagarkar for Petitioners

Shri HB SHAH for Respondent No. 1

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 15/01/98

ORAL JUDGEMENT :

Necessary facts giving rise to the present Civil Revision Application are that the petitioner, Bai Kashi filed a civil suit against Bai Kasturi, widow of original tenant, Budhasen Dalicahnd for eviction from the suit premises. The suit was decreed on 6.7.1968. The defendant, Kasturiben preferred appeal against the said judgment, which was dismissed by the judgment and decree dated 4.4.1970. She preferred Revision Application against the said judgment to this Court. A decree was drawn on 19.12.1973, exhibit 7, on consent terms between the parties. As per the consent terms the tenant

defendant Bai Kasturi was to hand over vacant possession of the first floor of the suit premises immediately to the plaintiff. However, she was allowed to continue on the ground floor till her life time on the same terms and conditions of the tenancy. Bai Kasturi died on 5.9.1975. Hence the plaintiff - decreeholder filed Darkhast on 2.1.1976 for execution of the decree. A possession warrant under Order 22, Rule 35 of the CPC was issued. Respondent Obstructor Brahmawati resisted Possession Warrant by submitting written objection (Harkat Purshis), inter alia, stating that she was in possession of the property in question since many years, hence the decree is not binding on her. In view of this the plaintiff decreeholder filed an application dated 14.2.1976 under Order 21, Rule 97(1) of CPC for removal of obstruction. Said application was registered as Application No.19/ 76. It was submitted that the premises was rented out to Budhasen, husband of defendant original judgment debtor, Kasturiben. Thus, she was the only tenant in the premises and none else. It was also stated that Obstructor, Brahmavati was in know of all the proceedings right from the trial court to the High Court. In view of this she was not entitled to create any resistance in the execution of the decree. It was stated by the Obstructor that her husband Khubchand and the husband of the defendant Kasturiben were the brothers. Budhsen being elder brother, all the tenancy transactions were carried on in his name. In fact all the members of the Hindu Undivided Family were tenants. Her husband Khubchand expired before about 32 years and Budhsen expired before about 18 years, after whose death also rent receipts were passed in the name of Budhsen. Both brothers, Budhsen and Khubchand were joint in all respects inclusive of kitchen, business and common nexus and in such capacity she is the tenant of the premises. As she was not made a party in the suit, the net result is that said consent decree is not binding on her. The executing court held that the obstruction removal application was filed against a dead lady and hence the same was not maintainable. The Court also held that the obstrcutor was in possession of the property in her capacity as tenant, as such the consent decree cannot be executed against her. Thus, the application for removal of obstruction was rejected. The petitioner preferred appeal which was rejected by the order of the Assistant Judge, Valsad on 22nd July 1983.

2. Shri Nagarkar, learned counsel for the petitioner contended that the court below has committed error in ignoring the fact that the Objector, Brahmavati could claim her right to stay in the suit premises only through

Kasturi as Budhsen was the original tenant. Except her widow, none else could inherit. It is also submitted that the compromise decree was passed on 19.12.1973, wherein it was agreed that Kasturiben's stay in the ground floor of the premises in question was only till her death. Thus, the possession of Kasturiben was protected only during her life time. Therefore, there could not be any obstruction. It is also submitted that the learned Judge committed error in rejecting the application for obstruction of removal on the ground that the execution application was not maintainable against the dead person. It is submitted that the execution was for removal of the person from the estate, as such Kasturiben was made party representing the estate.

3. On the other hand Shri H.B. Shah, learned counsel for the respondent Obstructor has submitted that there is concurrent finding of facts by the courts below and hence it does not call for interference by this Court in exercise of powers under sec.29 of the Bombay Rent Act. He has submitted that both the courts below have arrived at a finding of fact that Obstructor Brahmavati, widow of Khubchand had been, all through out, living in the suit premises. Both the brothers, Khubchand and Budhsen had their HUF; all the tenancy transactions were carried out in the name of Budhsen only because he was elder brother.

4. I have considered the rival contentions. It appears from the evidence on record that the premises were rented out to Budhsen, husband of Kasturiben. In the earlier suit filed in the year 1950 it was stated in the written statement by Budhsen that his family consists of four members excluding Khubchand and his family. Thus, simply because Brahmavati was also staying in the same premises, it cannot be said that she was also tenant in the premises. In any case, she cannot claim better right than Kasturiben. In view of this the learned executing court has committed error in not granting obstruction removal application filed by the petitioner decreeholder.

5. In view of the aforesaid, I allow the Civil Revision Application and set aside the order dated 22.7.1983 passed by the Assistant Judge, Valsad in Regular Civil Appeal No.77 of 1980 and order dated 27.10.1980, passed by the learned Civil Judge, Senior Division, Valsad, in Miscellaneous (Obstruction Removal) Application No.19/76, arising from the proceedings of Regular Execution Application No.1/76. Prayer of the decree holder for removal of obstruction is granted. On

formal prayer legal heirs of Bai Kashi shall be taken on
record. Rule is made absolute.

-oOo-

karim*